

Congress of the United States
Washington, DC 20515

September 20, 2022

The Honorable Shalanda D. Young
Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Director Young:

We write to bring to your attention *West Virginia v. Environmental Protection Agency (EPA)*, a recent Supreme Court decision that clarified the limitations of certain agency action.¹ Although Article I, Section 1 of the United States Constitution vests “all legislative powers” in Congress,² we are concerned the Biden Administration has largely relied on executive action to advance its agenda. For example, in his first year, President Biden issued more executive orders³ and approved more major rules⁴ than any recent president. Such reliance on administrative action undermines our system of government, which constitutionally provides Congress with legislative authority to ensure lawmaking is done by elected officials, not Executive Branch staff.

In *West Virginia v. EPA*, the Supreme Court invoked the “major questions doctrine” to reject an attempt by the EPA to exceed its statutory authority.⁵ As the Court explained, “[p]recedent teaches that there are ‘extraordinary cases’ in which the ‘history and breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”⁶ Under this doctrine, an agency must point to “clear congressional authorization for the authority it claims.”⁷ However, the EPA could not point to such authorization. Rather, the

¹ *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022).

² U.S. Const. art. I, § 1.

³ Federal Register, *Executive Orders* (accessed Aug. 2022), available at <https://www.federalregister.gov/presidential-documents/executive-orders>.

⁴ Deep Dive, *How Biden Has Made Policy With Short-Term, Costly Rules: Charts*, Bloomberg Law (May 2022), available at <https://news.bloomberglaw.com/environment-and-energy/how-biden-has-made-policy-with-short-term-costly-rules-charts>.

⁵ *West Virginia*, 597 U.S. at 5-6.

⁶ *Id.* at 4 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 129, 159-160).

⁷ *West Virginia*, 597 at 4.

EPA “discover[ed] an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler.”⁸ Notably, such discovery “allowed [EPA] to adopt a regulatory program that Congress had conspicuously declined to enact itself.”⁹ As a result, the Court rejected the EPA’s attempt to so plainly exceed its statutory authority.

Unfortunately, EPA’s attempt to invent new authorities is not an isolated incident in this Administration. Recently, the Court struck down the Centers for Disease Control and Prevention’s attempt to impose an eviction moratorium¹⁰ and the Occupational Safety and Health Administration’s attempt to impose a vaccine or testing mandate.¹¹ In *West Virginia v. EPA*, the Court made clear that such reliance on the administrative state will no longer be allowed. To be clear, “the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives.”¹² In the United States, it is “the peculiar province of the legislature to prescribe general rules for the government of society.”¹³

The Office of Management and Budget (OMB) – specifically its Office of Information and Regulatory Affairs – plays a central role in the review and interagency coordination of “significant” and “economically significant” rules proposed by the Executive Branch. It also scrutinizes agencies’ economic analyses of the costs and benefits of proposed regulatory actions and helps agencies determine whether executive actions warrant notice to Congress under the Congressional Review Act. OMB also oversees the budget and apportionment process to ensure Executive Branch compliance with the Antideficiency Act.

As the committees overseeing your agency and all agencies’ funding, we are concerned about the pace, volume, and legal grounding of some of the major regulatory actions coming from the Administration. We seek to ensure these regulatory actions do not exceed Congressional authorizations. Of particular concern to our members are recent announcements using taxpayer funds to cancel student loan debts, with no published legal or regulatory analysis;¹⁴ and a recent determination by the Government Accountability Office (GAO) that the Administration made a unilateral decision in 2021 to increase government outlays by over \$250 billion over ten years by updating the Thrifty Food Plan—which establishes the Supplemental Nutrition Assistance Program benefit amounts—without notice to Congress in contravention of the Congressional Review Act.¹⁵

⁸ *Id.* at 5.

⁹ *Id.* at 5.

¹⁰ *Alabama Assn. of Relators v. Department of Health and Human Servs.*, 594 U.S. ____ (2021).

¹¹ *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U.S. ____ (2022).

¹² *West Virginia*, 597 at 56 (Gorsuch, J., concurring).

¹³ *Fletcher v. Peck*, 6 Cranch 87, 136 (1810).

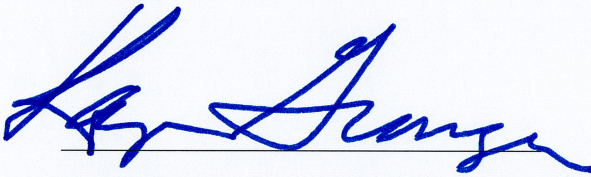
¹⁴ See White House Fact Sheet, *President Biden Announces Student Loan Relief for Borrowers Who Need It Most* (Aug. 24, 2022), at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/>.

¹⁵ GAO, *United States Department of Agriculture—Applicability of the Congressional Review Act to the 2021 Updates to the Thrifty Food Plan*, B-333732 (Jul. 28, 2022), available at <https://www.gao.gov/products/b-333732>; OMB, *Mid-Session Review, Budget of the U.S. Government, Fiscal Year 2022* (Aug. 2021) at 11, available at https://www.whitehouse.gov/wp-content/uploads/2021/08/msr_fy22.pdf.

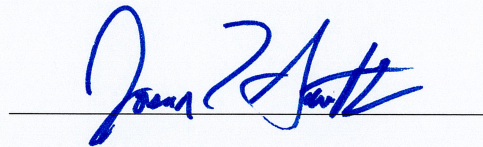
We expect the Administration to act within the law and within the funding appropriated by Congress. Accordingly, please answer the following no later than October 4, 2022:

1. An explanation of the procedures in place to ensure regulatory proposals with “economic and political significance” have “clear Congressional authority.”
 - a. An explanation of the changes and enhancements to those procedures that have been or will be made by OMB, following the Supreme Court decision in *West Virginia v. EPA*.
 - b. Specifically, a legal and regulatory analysis demonstrating there is “clear Congressional authority” allowing federal funds to be used on student loan cancellations as outlined by the Administration on August 24, 2022.¹⁶
2. An explanation of the procedures in place to ensure proper reporting of agency actions to Congress, pursuant to the Congressional Review Act.
 - a. Specifically, an explanation of the changes and enhancements to those procedures following the GAO decision, *United States Department of Agriculture—Applicability of the Congressional Review Act to the 2021 Updates to the Thrifty Food Plan*, B-333732 (Jul. 28, 2022).¹⁷

Sincerely,



Kay Granger
Ranking Member
Committee on Appropriations



Jason Smith
Ranking Member
Committee on the Budget

Cc: The Honorable Rosa DeLauro, Chair, Committee on Appropriations
The Honorable John Yarmuth, Chairman, Committee on the Budget

¹⁶ See *supra* note 14.

¹⁷ See *supra* note 15.